IN THE

Supreme Court of the United States

October Term, 1943

No.

AMERICAN CREOSOTING COMPANY, INCORPORATED,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Questions Presented	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	12
Appendix	13

Table of Cases.

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197	11
Dobson v. Commissioner of Internal Revenue, 320 U. S. ——, 88 L. Ed. 179, decided December 20, 1943	7, 8
Eagle-Picher Mining & Smelting Co. v. National Labor Relations Board, 119 F. (2d) 903 (C. C. A. 8)	9
Federal Power Commission v. Hope Natural Gas Co., 320 U. S. ——, 88 L. Ed. 276, decided January 3, 1944	7, 8
H. J. Heinz Co. v. National Labor Relations Board, 311 U. S. 514	11
National Labor Relations Board v. Electric Vacuum Cleaner Co., 315 U. S. 685	9, 10
National Labor Relations Board v. Isthmian S.S. Co., 126 F. (2d) 598 (C. C. A. 2)	9
National Labor Relations Board v. William Davies Co., 135 F. (2d) 179, 183 (C. C. A. 7)	9

PAGE

Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 199 (1941) 6

Triplex Screw Co. v. National Labor Relations Board, 117 F. (2d) 858 9

Authorities Cited.

Administrative Policies and the Courts (47 Yale Law Journal 519, 535 (1938)) by James M. Landis 8

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AMERICAN CREOSOTING COMPANY, INCORPORATED, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit entered on December 4, 1943 (R. 606) enforcing with modification an order issued by the National Labor Relations Board against the petitioner.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 607) is reported in 139 F. (2d) 193. The findings of fact, conclusions of law, and order of the Board (R. 84-111) are reported in 46 N. L. R. B. 240.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered December 4, 1943. The jurisdiction of this Court is invoked

under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10(e) of the National Labor Relations Act.

Statute Involved.

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix to this petition.

Questions Presented.

The Circuit Court of Appeals had the case before it on the petition of the National Labor Relations Board seeking enforcement of the Board's order which directed reinstatement of forty-one men with back pay. The Court concluded that it had no power to review the time element in a back pay award. The Court also concluded that it would not disturb the Board's finding that the strike at the petitioner's plant in 1937 had been caused by unfair labor practices.

Accordingly, the following questions are presented:

1. Does the power of judicial review of administrative orders extend to a case in which the National Labor Relations Board penalizes an employer for the Board's own neglect—here the failure to issue a complaint for four years from the events complained of and for more than three years after the last of several "charges" was filed with the Board by the Union?

2. As a corollary of the first question, should this Court not strike at least two and one-half years from the back pay award, and this after an allowance of more than six months—surely more than is necessary—for the Board to investigate and issue a complaint?

3. Did the Circuit Court of Appeals place too much emphasis in this case on what it referred to in its opinion as "the liberality accorded" the Board's "concept of substantial evidence" (R. 608); and on a proper conception of "substantial evidence" should not the Board's petition have been dismissed?

Statement.

On September 24, 1937, a sit-down strike occurred at the respondent's plant at Russell, Kentucky, which at that time employed about 120 men. The sit-down strike, a partial strike of key men, was called upon instructions from the Union (R. 305, 362). It was followed by another sit-down strike on October 4, 1937 (R. 309, 518) and a general strike of the entire plant followed (R. 138). The strike terminated December 23, 1937 (R. 184). More than four years after the strike began and more than three years after the filing of the last charge, which was the second amended charge filed August 4, 1938 (R. 28, 106), the National Labor Relations Board issued its complaint dated October 6, 1941 (R. 30), alleging violations of the Act and alleging that the strike was caused and prolonged by unfair labor practices on the part of your petitioner.

Hearings were held in November, 1941 (R. 111-571). The Trial Examiner filed an intermediate report (R. 44) to which your petitioner excepted (R. 71). Your petitioner presented to the Board various arguments on the law and the facts, particularly objecting to the provision for back pay for more than three years and nine months before the issuance of the complaint. The Board's decision (R. 84) ignored the latter point, discussed the other matters at length and ordered your petitioner to pay back pay to forty men beginning in 1937 and to one man beginning August 4, 1938.

On the Board's petition for enforcement, the Circuit Court of Appeals on December 4, 1943 modified the Board's order to give your petitioner the benefit of the fact that the average number of employees after the strike was considerably smaller than the number employed before the strike. A group of twenty-eight of the men, said the Court, "as a group is entitled to the composite of wages paid to the group which replaced it" (R. 612). This petition does not question this modification.

However, the Court concluded that it was without power to shorten the duration of the back-pay period under the circumstances here. The Court further concluded that "while the Board drew inference of sinister purpose from some circumstances that may have been innocuous, * * *" (R. 609) it nevertheless would not disturb the Board's findings.

The foregoing statement is a brief summary of the chronology of the case. For convenient reference, some of the points are discussed more fully in the next subdivision of this petition.

Reasons for Granting the Writ.

A.

The Circuit Court of Appeals has said in effect that it is without power to review the extent to which a back pay award may properly antedate the issuing of a complaint by the Board. The Court's stated reason is that "the statute contains no time-limit mandate" (R. 610).

Thus the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The question was disposed of in the Court's opinion of December 4, 1943, by this brief discussion:

> "The respondent protests against being required to contribute back-pay from December, 1937, to the date of compliance. While the charges filed with the Board were seasonable, the hearing did not take place until four years after the strike, with the Board's decision coming a year later. Such delay, it is urged, makes the back-pay order unconscionable. However, we held in *Triplex Screw Co.* v. *N. L. R. B.*, 117 Fed. (2d) 858, that a complaint of this character does not fall within the purview of our power to grant relief since the statute contains no time-limit mandate for the rendering of decisions by the Board" (R. 610).

Although the foregoing quotation shows how the Court disposed of the question, it does not contain a precise statement of your petitioner's position. Your petitioner does not argue that delays *after* the complaint was issued on October 6, 1941 (R. 30) should reduce back pay. It is the delay prior thereto which was the basis of your petitioner's objections before the Board, the Circuit Court of Appeals, and is now the basis here. The first charge was filed with the Board in December, 1937 (R. 601). The second amended charge (R. 28) upon which the complaint was issued was filed August 4, 1938 (R. 106).

Thus there was a delay of more than three years between the time when the Board was called upon to act and the date of the issuance of the complaint. Regardless of the reasons for the delay, your petitioner should not be called upon to pay back pay to forty-one men for this period. There was no way that your petitioner could know during that time whether the Board considered the case of sufficient merit to justify a complaint and a hearing, and

hence no way for your petitioner to make financial provision for the huge liability which might result and which has now resulted.

The National Labor Relations Act did not compel the Board to reach into the past more than three years prior to the date of its complaint for the beginning of the back pay. "The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 199 (1941).

Naturally there are many cases where in the regular administration of the Act it has been and will be proper to start the back pay running on a date prior to the issuance of the complaint. This period should be reasonable. A period of more than three years is unreasonable, unconscionable and is a discredit to the Act rather than an effectuation of its policies.

But, it will be said in answer, the Board found (R. 109) that it "will effectuate the policies of the Act" to have back pay computed as set forth in its order, *i. e.*, without diminution by reason of the delay, and it will be said that this finding is conclusive. There will be invoked the usual arguments to support the claim of finality of administrative orders.

Such arguments may be sound in a proper case, but the petitioner submits that this is not a proper case. The Court should not abdicate its functions by refusing to review the question here presented, and the Court below was in error when it stated that "a complaint of this character does not fall within the purview of our power to grant relief" (R. 611).

The reason is this: in issuing its finding and order on this point the Board was passing judgment upon its own

fault and was saddling your petitioner with a penalty which had grown to tremendous size as the result of the Board's delay in issuing a complaint. Should an administrative body be immune from judicial review of such an internal failing, particularly since the consequences are so disastrous?

In recent months this Court has had occasion more than once to examine the scope of its review of administrative action. One such case is *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. ....., 88 L. Ed. 276, decided January 3, 1944. Another is *Dobson* v. *Commissioner of Internal Revenue*, 320 U. S. ....., 88 L. Ed. 179, decided December 20, 1943. In the latter case this Court stated at some length the reasons why the Tax Court as an administrative body is qualified to receive from the courts the benefits of the doctrine of finality of administrative determination. A statement of some of those reasons reveals some striking contrasts:

1. The Tax Court, it was said by this Court, "is independent and its neutrality is not clouded by prosecuting duties." 88 L. Ed. at p. 185.

Contrast: The National Labor Relations Board investigated, interviewed witnesses, prepared the case.

2. The Tax Court's "deliberations are evidenced by careful opinions." 88 L. Ed. at p. 185.

Contrast: For all the petitioner's exceptions, objections and arguments before the National Labor Relations Board and the Court on the question of the three-year delay the petitioner has received nothing but silence from the Board and a word of regret from the Court of Appeals declining to deal with the question.

3. In the case of the Tax Court, "individual cases are disposed of wholly on records publicly made, in adversary proceedings, and the [Tax] court has no responsibility for previous handling" 88 L. Ed. at page 185.

> *Contrast:* The National Labor Relations Board is the adversary and has complete responsibility for previous handling, including the decision when and whether to issue a complaint.

Even more important, both the opinions referred to above revert to a frequently-advanced reason for administrative finality, viz., that the administrators are experts in a specialized field. The Tax Court "deals with a subject that is highly specialized and so complex as to be the despair of judges." *Dobson* v. *Commissioner*, 320 U. S. ___, 88 L. Ed. 179, 185. An order of the Federal Power Commission "is the product of expert judgment which carries a presumption of validity." *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. ___, 88 L. Ed. 276, 283.

But when a government Board with administrative functions passes judgment on its own faults it is not an impartial expert in a highly specialized field and should not be immune from judicial review.

The position was stated another way by James M. Landis in *Administrative Policies and the Courts*, 47 Yale Law Journal 519, 535 (1938):

> "I return thus to the issue of 'law' as being the dividing line of judicial review—as bounding the province of that 'supremacy of law' that is still our boast. Its content, in so far as it relates to judicial review of administrative action, seems to me to reach back to the question of expertness. *Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions.*" (Italics in original.)

The Board in its brief below and the Circuit Court of Appeals in its opinion both relied upon the opinion of this Court in *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685. Other decisions of Circuit Courts of Appeal have also cited the *Electric Vacuum Cleaner* case in various situations.* However, it is submitted that the question presented by this petition is not settled by the *Electric Vacuum Cleaner* case, and that the Circuit Court of Appeals was in error in interpreting the *Electric Vacuum Cleaner* case as depriving it of power.

The entire substance of this Court's disposition of the delay aspect of the *Electric Vacuum Cleaner* case is found in this one paragraph from the Court's opinion:

> "We have noted the employer's objection to the burden of back pay placed upon it because of the Board's alleged delay in entering the final order. Handling of complaints as quickly as is consistent with good administration is of course essential. It is important both to the employer, who may have to pay back wages, and to the employee, who must live without his job. Unfortunately, this cause took from June 10, 1937, to December 31, 1939. There is nothing in the record, beyond a failure of the Board to file an intermediate report, which would tend to justify us, however, in shortening the period for compensation. This error was admitted and corrected by the Board. We cannot penalize the employees for this happening" (315 U. S. at pp. 697-8).

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* In its opinion in the instant case the Circuit Court of Appeals pointed to its own earlier opinion in *Triplex Screw Co.* v. *National Labor Relations Board*, 117 F. (2d) 858, and stated that the following are "to the same effect": *National Labor Relations Board* v. *Isthmian S.S. Co.*, 126 F. (2d) 598 (C. C. A. 2); *National Labor Relations Board* v. *William Davies Co.*, 135 F. (2d) 179, 183 (C. C. A. 7); *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board*, 119 F. (2d) 903 (C. C. A. 8); *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685.

It is apparent that the employer was objecting to delays which occurred after, not before, the complaint was issued. The complaint in the *Electric Vacuum Cleaner* case was issued within a few months after the events complained of. This fact appears from this Court's opinion and from the Board's report referred to therein.

In short, the employer's objection in the *Electric Vacuum Cleaner* case was that the wheels of the administrative mill ground too slowly. The objection of your petitioner here is that it took more than three years for the wheels to begin to turn.

It will not do to dispose of the question as was done in the *Electric Vacuum Cleaner* case by stating: "We cannot penalize the employees for this happening" (315 U. S. at p. 698). The argument works both ways. Why should the employer be the one to be penalized for the defaults of the Board over which the employer had no control? Why should the employer bear the burden when the Board cannot make up its mind for more than three years to give the employer definite notice of the existence of a possible liability?

B.

Your petitioner has consistently taken the position before the Board and before the Court that the alleged evidence of unfair labor practices in this case is so feeble that the inferences drawn by the Board are entirely unwarranted. Only by an unwarranted stretching of a form of false reasoning is it possible to conclude that the strike was anything more than a test of economic strength, not stimulated nor accompanied by any unfair labor practices on the part of your petitioner.

The Court of Appeals was urged by your petitioner to consider the familiar admonition from *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (p. 229).

However, the Court did no more than refer in its opinion to the *Consolidated Edison* case. The Court did not attempt to demonstrate its application, and applied it in a way probably in conflict with this Court's decision.

As an indication, the significance of *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, to this case might be considered. The *Heinz* case, it will be recalled, was decided January 6, 1941, and held that it was an unfair labor practice for an employer not to sign an agreement with the Union once the terms had been agreed upon. In the present case it so happened that in 1937 your petitioner and the Union made an agreement; it was drawn up in writing but it was not signed. The agreement was in force for about six months, and when the date approached on which the contract would expire by its terms, the Union, on September 2, 1937, wrote your petitioner that on September 7, 1937, they would present "desired changes and amendments to the working agreement" (R. 152). On September 7, 1937, the Union presented its new demands which included a closed shop, a check-off, much higher wages and much better working conditions (R. 153, 213, 338, 365-6). The Union's position was that when the strike began on October 4, 1937, the unsigned agreement had been terminated by giving notice (R. 157).

The attention of the Circuit Court was directed to these matters, and also to the fact that the lack of a signature on

the 1937 agreement was never considered of any practical importance until after the *Heinz* case was decided in 1941, several years later. Contemporaneous letters and the Union's charges omit any reference to the lack of a signature, and refer to wages, hours, and the other demands (R. 135, 152, 153, 213, 338, 289, 174, 597, 601).

The Court of Appeals appears to have misapprehended the significance of these points and to have considered them without merit since the petitioner did not "claim surprise" (R. 609). The true significance is that these and other points demonstrate forcibly that the Board's findings are not supported by proper evidence.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: March 2, 1944.

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